Ashin Sdn Bhd v Datuk Bandar Kuala Lumpur & Ors

HIGH COURT (KUALA LUMPUR) SUIT NO S2-21-108 OF 1997
KAMALANATHAN RATNAM J
6 APRIL 1999

Civil Procedure *— Costs — Security for costs — Application for — No accounts had been provided by plaintiff since incorporation — Whether since plaitniff had spent more than its paid-up capital, it was insolvent — Court to be wary of hidden agenda of party to seek security for costs to thwart litigation — Whether application allowed*

The third defendant represented that it would give first opportunity to any person who would submit a proposal for privatization and development of a certain piece of land ('the land'). The plaintiff was the first to submit an application for the development plan. In breach of the representation, the first and third defendants invited the plaintiff for a tender exercise which the plaintiff did, together with the second defendant. The plaintiff alleged unfair practice by the first defendant in the award of the tender to the second defendant. The plaintiff thus made a claim against the defendants for the sum of RM3.59m spent for the preparation of the development plan and for a declaration that the award of tender to the second defendant was null and void. The second defendant then filed an application to compel the plaintiff to provide security for cost on the grounds that no accounts had been provided by the plaintiff since its incorporation and that because it had spent more than its paid-up capital, it was therefore insolvent. The deputy registrar made an order that the plaintiff do provide for costs in the sum of RM37,000. The plaintiff appealed.

Held, allowing the appeal:

(1) Whilst it had not been shown the relevance of having to provide the accounts since incorporation, the plaintiff had averred that it had provided the audited accounts for the years 1991-1994. No discovery had been sought by the second defendant nor any other challenge made to this averment. Obviously, the first and third defendants must have been satisfied with the plaintiff's production of the accounts and the plaintiff's impecuniosity if any could not have been an issue because the plaintiff was in any case allowed to tender (see p 667B–C).

(2) The request for costs clearly tantamount to an act of oppression upon the plaintiff. The court must always be wary of the hidden agenda of a party to litigation to seek an order for security for costs in order to thwart litigation. In the present case, the court was not at all satisfied that the reasons given merited an award for security for costs (see p 667E).

(3) Another factor taken into account was that neither the first nor the third defendants had sought security for costs. Based on the facts

presented, if at all any party might have a reason to seek security, it would be the first or third defendants because the allegation seemed to be that it was the second defendant that influenced these other two parties (see p 668D–E).

[Bahasa Malaysia summary

Defendan ketiga telah membuat representasi bahawa ia akan memberikan peluang kepada sesiapa saja yang akan memberikan usul untuk penswastaan dan memajukan tanah yang tertentu ('tanah tersebut'). Plaintif adalah pemohon yang pertama menghantar permohonan untuk rancangan kemajuan tanah tersebut. Dalam memecah representasi yang dibuat, defendan pertama dan defendan ketiga telah menjemput plaintif untuk suatu pelaksanaan tender di mana plaintif telah berbuat demikian, bersama-sama dengan defendan kedua. Plaintif telah mendakwa amalan yang tidak adil oleh defendan pertama di dalam mengaward tender kepada defendan kedua. Oleh itu, plaintif telah membuat tuntutan terhadap defendan-defendan untuk RM3.59 juta yang dibelanjakan untuk menyediakan rancangan kemajuan dan untuk suatu deklarasi bahawa tender yang telah diberikan kepada defendan kedua adalah batal dan tak sah. Kemudian, defendan kedua memfailkan permohonan untuk memaksa plaintif untuk memberikan jaminan untuk kos atas alasan-alasan bahawa bahawa tiada akaun-akaun telah dibekalkan oleh plaintif sejak ia diperbadankan dan oleh kerana ia telah menggunakan lebih daripada modal berbayarnya, ia adalah tidak solven. Timbalan pendaftar telah membuat perintah bahawa plaintif memberikan kos di dalam jumlah RM37,000. Plaintif telah merayu.

Diputuskan, membenarkan rayuan:

(1) Walaupun tidak ditunjukkan kepentingan untuk memberikan akaun-akaun sejak diperbadankan, plaintif telah menegaskan bahawa ia telah memberikan akaun-akaun yang diauditkan dari tahun 1991-1994. Tiada penzahiran diminta oleh defendan kedua atau persoalan dibuat terhadap penegasan tersebut. Adalah jelas bahawa defendan pertama dan defendan ketiga mesti telah berpuas hati terhadap pengemukaaan akaun-akaun plaintif dan kemiskinan plaintif walau sekalipun tidak boleh menjadi suatu isu kerana plaintif telah dibenarkan untuk mengemukakan tender (lihat ms 667B–C).

(2) Permintaan untuk kos adalah jelas terjumlah kepada suatu tindakan penindasan terhadap plaintif. Mahkamah mestilah berhati-hati terhadap agenda tersembunyi sesuatu pihak kepada litigasi yang meminta perintah utnuk jaminan kos untuk menghalang litigasi. Dalam kes ini, mahkamah tidak berpuas hati bahawa sebab-sebab yang diberikan mewajarkan award untuk jaminan kos (lihat ms 667E).

A (3) Suatu faktor lain yang perlu dipertimbangkan adalah defendan pertama dan defendan ketiga telah meminta untuk jaminan kos. Berdasarkan fakta-fakta yang dikemukakan, jika ada sesuatu pihak yang mempunyai sebab untuk mendapatkan jaminan kos, ia adalah defendan pertama dan defendan ketiga oleh kerana pengataan adalah seolah-olah defendan kedua yang telah
B mempengaruhi kedua-dua pihak yang lain (lihat ms 668 D–E).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998
C Reissue) paras 1338–1369.

Cases referred to

New Zealand Insurance Co Ltd v Ong Choon Lin [1992] 1 MLJ 185 (refd)

D *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 (refd)

Legislation referred to

Companies Act 1965 s 351(1)

E *Gopi Seshadari* (*Vicky Wong* with him) (*Lee Hishammuddin*) for the appellant.

Rizwan Borhan (*Hamid Sultan & Rakan-Rakan*) for the respondent.

B Thangaraj (*Thangaraj & Associates*) for the first defendant.

F **Kamalanathan Ratnam J**:

Facts

The plaintiff sued the defendants for loss and damage suffered. The statement of claim pleaded in detail disclosed that the third defendant
G announced that it would give first opportunity to any person who would submit a proposal for privatization and development of a certain piece of land ('the land'). The plaintiff was the first to submit an application for the development plan for a mixed development project with related infrastructure facilities and amenities in the land in 1984. Sometime in 1993, the plaintiff was informed by the Pentadbir Tanah Wilayah
H Persekutuan that the development plan for the said project was approved. The statement of claim showed that up to that stage the plaintiff had, upon the third defendant's representation, spent a sum of RM3.59m for the preparation of the development plan for the said project. Specific details in respect of this sum were pleaded. In spite of numerous letters to the first defendant to negotiate for the execution of the development plan for the
I said project, the first defendant did not respond. The plaintiff also pleaded that in breach of the representation, the first and third defendants invited

the plaintiff for a tender exercise. By a letter dated 10 September 1990 the plaintiff was invited to participate in the tender which the plaintiff did, together with the second defendant and two other companies. The plaintiff alleged unfair practice by the first defendant in the award of the tender to the second defendant.

Plaintiff's claim

The plaintiff, thus, inter alia, made a claim against the defendants for the said sum of RM3.59m and for a declaration that the award of tender to the second defendant is null and void on the basis that the second defendant had wrongfully influenced the first and third defendants to award the said tender to the second defendant. In its defence the second defendant alleged that it was not aware of the details of the development plan submitted by the plaintiff.

Security for costs

The second defendant then filed an application to compel the plaintiff to provide security for costs in the sum of RM100,000 and that until the said sum was provided all further proceedings be stayed. The learned deputy registrar having heard submissions made an order on 13 October 1998 that the plaintiff do provide security for costs in the sum of RM37,000. The second defendant being dissatisfied appealed to the judge in chambers (encl 41). The plaintiff being dissatisfied with the said order also filed an appeal (encl 40).

On 2 December 1998 when both appeals came up before me, I pointed out an irregularity in the second defendant's notice of appeal. Learned counsel for the second defendant then applied for an adjournment to amend his notice of appeal and counsel for the plaintiff having no objections, I adjourned the said hearing to a later date.

Parties then agreed to proceed with the plaintiff's appeal against the award of security for costs.

Findings of the court

It is the second defendant's contention that since the plaintiff's paid-up capital is only RM1.5m which the second defendant had ascertained after making a search at the Registrar of Companies, and since the plaintiff had spent RM3.59m, it was therefore insolvent. Further it was argued that the search also showed that no financial accounts had been filed by the plaintiff with the Registrar of Companies since its incorporation in 1984 and hence there was no evidence that the plaintiff was generating income. By an order dated 4 March 1998 the plaintiff was required to produce documents that were referred to in its pleadings relating to the expenses amounting to RM3.59 million. The plaintiff was however only able to produce some of the documents.

Denying the allegation that it had not filed its accounts the plaintiff in its reply contended that it had, when submitting for the tender, produced audited accounts for the years 1991–1994.

A Question of oppression

Having heard the submissions of the parties I allowed the plaintiff's appeal with costs in the cause and set aside the learned deputy registrar's order that the plaintiff do provide security for costs.

B The second defendant has premised his plea for security for costs on two grounds:

(1) That no accounts had been provided since incorporation.

On this issue, whilst I have not been shown the relevance of having to provide the accounts since incorporation, the plaintiff has averred that it C had provided the audited accounts for the years 1991–1994. No discovery has been sought by the second defendant nor any other challenge made to this averment. Obviously, the first and third defendants must have been satisfied with the plaintiff's production of the said accounts and the plaintiff's impecuniosity if any, could not have been an issue, because the plaintiff was in any case allowed to tender.

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(2) That because it had spent more than its paid-up capital it is therefore insolvent.

If this is to be a ground for seeking security for costs, then a large portion of the companies in Malaysia will be hard put to trade because most of the E companies would be in a similar position.

To my mind this request for costs is clearly tantamount to an act of oppression upon the plaintiff. The court must always be wary of the hidden agenda of a party to litigation to seek an order for security for costs, in order to thwart litigation. In respect of the case before me I am not at all satisfied that the reasons given merited an award for security for costs.

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It is trite law that an appellate court will not interfere in the exercise of discretion by a lower court unless such an exercise of discretion had been premised on wrong grounds (see *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185 (SC)).

It is obvious that this application for security for costs is made under G s 351(1) of the Companies Act 1965 which reads as follows:

> Where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be H given for those costs and stay all proceedings until the security is given.

In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 where the Court of Appeal was called upon to decide on a similar issue based on s 447 of the Companies Act 1948 which is almost in identical terms with our s 351(1), Lord Denning MR said at p 285 as follows:

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> Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

He continued at the same page and at p 286:

> The court might also consider whether the application for security was being used oppressively so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

In this case the plaintiff had made detailed allegations that the second defendant had taken unfair advantage by influencing the first and third defendants to award to itself the tender. The plaintiff has also averred that at the time the second defendant applied for the said tender its paid-up capital was only RM25,000 and that it was at all material times a dormant company with no financial strength or technical skill to bid for the tender.

I am of the opinion that the second defendant's conduct, if proven true, falls squarely within such conduct of the second defendant that according to Lord Denning MR ought to bear scrutiny. If such allegation by the plaintiff is proven true clearly an application for security for costs is being used oppressively so as to try and stifle a legitimate claim by the plaintiff.

Another factor I take into account is that neither the first nor the third defendants have sought security for costs. To my mind based on the facts so far presented if at all any party might have a reason to seek security it would be the first or third defendants because the allegation seems to be that it was the second defendant that influenced these other two parties. In the circumstances I consider their non-application for security as an additional factor that motivated me to allow this appeal.

Finally, there is no counterclaim to this action. The second defendant merely asked for RM100,000 or such further sum as security for costs to defend this action. The plaintiffs claim in itself amounts to RM3.59 m. The learned deputy registrar only awarded RM37,000 as security for costs. In support of its claim for RM100,000 the second defendant itemized its estimated costs as follows:

(a)	All correspondence, perusing documents in preparation of the case	RM25,000
(b)	Attending court for interlocutory matters (at a rate of RM1200 per attendance) 20 days	RM2,400
(c)	Attending court for the trial (at a rate of RM500 per attendance) 10 days	RM5,000
(d)	Preparation and overall getting-up	RM55,000
(e)	Photocopying charges	RM15,000

Seriously looking into the figures stated therein, I am unable to find any evidence of justification in the affidavit in support of the application for

security for costs affirmed by the second defendant's director. To me it is more a figure based on guess work rather than an educated and calculated estimate of figures.

It was on all these considerations that I made the order I did.

Appeal allowed.

Reported by Jafisah Jaafar